No. 50819-2-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Thurston County Case No. 17-2-04477-3

TIM EYMAN, Appellant,

v.

ROBERT FERGUSON, in his capacity as
Attorney General of the State of Washington, Respondent

APPELLANT'S REPLY

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REPLY

The Attorney General, by misrepresenting Mr. Eyman's argument, raises the common logical fallacy of the strawman to which this Court should not give countenance.

Mr. Eyman's Petition has always sought Declaratory Judgment from the Trial Court on the set of facts which neither party disputes, to declare that RCW 43.135.041 requires the attorney general to provide a separate advisory vote for each tax increase included in bills such as Engrossed House Bill 2163; and that RCW 43.135.041 defines the revenue increases described and enacted in Engrossed House Bill 2163 to be tax increases.

The Attorney General claims that the issue of "what is a revenue source and what amounts to a tax increase for purposes of advisory votes—are better decided in the context of particular legislative action, rather than in the abstract as an advisory opinion."

This assertion is simply incorrect under the Uniform Declaratory Judgment Act, which is the authority under which Mr. Eyman has sought relief. The issue before this court is whether the Court should have adjudicated Eyman's motion on the merits, and made a determination whether the Attorney General violated the applicable statute in respect of advisory votes, notwithstanding however the voters may have voted. The difficulty created by the Attorney General's violation of the statute has

created the difficulty that is now before both the legislators and the general public: Which specific tax increase did the voters reject? Had the Attorney General correctly applied the statute, this ambiguity would not exist as a matter of the recorded intent of the voters.

The Attorney General again claims erroneously that "[b]y the time Mr. Eyman filed his complaint, he was not able to obtain the remedy he sought: a change to the 2017 general election ballots." This is simply false. Mr. Eyman sought a declaratory judgment whether the Attorney General was violating the statute regarding the hard-fought advisory vote requirement found therein, irrespective of the language used by the Attorney General on the ballot.

The statute, in operative part at issue here, provides that "(b) If legislative action raising taxes enacted after July 1, 2011, involves more than one revenue source, each tax being increased **shall be** [bold added] **subject to a separate measure** [bold added] for an advisory vote of the people under the requirements of this chapter." RCW 43.135.041(b).

This is not a legislative function. Rather, this is properly before the court, requiring a judicial decision. The court's fundamental objective in construing a statute on declaratory judgment is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of

legislative intent. *J.M.,* 144 Wash.2d at 480, 28 P.3d 720. This is well settled law.

When the statute is unambiguous, a word is given its plain and obvious meaning. *Addleman v. Bd. of Prison Terms & Paroles,* 107 Wash.2d 503, 509, 730 P.2d 1327 (1986); see *Young v. Estate of Snell,* 134 Wash.2d 267, 279, 948 P.2d 1291 (1997) (the meaning of a statute must be derived from the wording of the statute itself where the statutory language is plain and unambiguous); *Waggoner v. Ace Hardware Corp.,* 134 Wash.2d 748, 752, 953 P.2d 88 (1998) (same); *State ex rel. Royal v. Bd. of Yakima County Comm'rs,* 123 Wash.2d 451, 458, 869 P.2d 56 (1994) (same).

Only if the meaning of the language is ambiguous or unclear is it then appropriate as part of the inquiry into what the Legislature intended. See, e.g., *Addleman,* 107 Wash.2d at 509, 730 P.2d 1327; *Sebastian v. Dep't of Labor & Indus.,* 142 Wash.2d 280, 285, 12 P.3d 594 (2000). In this case, the language is unambiguous, and the Court need not reach legislative intent. The plain meaning rule requires courts to consider legislative purposes or policies appearing on the face of the statute as part of the statute's context. 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 48A:16, at 809-10 (6th ed. 2000) (extracts from R. Randall Kelso & C. Kevin Kelso, APPEALS IN

FEDERAL COURTS BY PROSECUTING ENTITIES OTHER THAN THE UNITED STATES: THE PLAIN MEANING RULE REVISITED, 33 Hastings L.J. 187 (1981)).

Under this second approach, the plain meaning is still derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said **in the statute** [bold added] and related statutes which disclose legislative intent about the provision in question. If, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous, and it is appropriate to resort to aids to construction, including legislative history. *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 808, 16 P.3d 583 (2001); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wash.2d 305, 312, 884 P.2d 920 (1994).

The facts at hand are not disputed. The Attorney General placed a single issue on the ballot that asked for a single advisory vote from the voters on three proposed revenue increases. This presentment was in violation of the statute. A determination by this court that the actions of the Attorney General in this regard violated the statute prevents the statute from becoming meaningless because of the practice of the Attorney General under it, who is most capable of ignoring the provisions of the statute again.

The Attorney General's decision to combine multiple revenue sources into a lone advisory vote conflicts with the legislative intent of the voters as determined in Initiative 960 and is contrary to the plain, every day meaning of phrase "revenue source." The average person would not consider new revenues from taxes on bottled water, on self-produced fuel, and on internet sales to be the same revenue source. The average voter would not know Title 82 from Title 83 and 84. As the AG cited in their response, the intent section of Initiative 960 read, in part: "… the legislature should be aware of the voters' view of individual tax increases." The legislature will only be aware when RCW 43.135.041(b) is given plain meaning.

It is a certainty that the legislature is not now aware if EHB 2163 was disapproved by the voters because they disagreed with taxing bottled water more than they agreed in taxing self-produced fuel; or if the voters were strongly opposed to internet sales being taxed, but were complacent or nonchalant concerning taxes on bottled water and self-produced fuel. It is possible the voters did not approve all three. However, because of the manner in which the Attorney General presented the issue to the voters, the legislature can reach no reasonable conclusion as to voter expression.

When the strawman fallacy is properly ignored, what remains of the Attorney General's argument is whether the remedy sought by Mr. Eyman

is moot. RCW 29A.72.283 sets a time limit on the Attorney General, not on Mr. Eyman. The statute declares that the short description is not subject to appeal. This finality is inapplicable to Mr. Eyman's petition here. In fact, there is no statute of repose in respect of bringing a Declaratory Judgment action on the issue of whether RCW 43.135.041 requires the Attorney General to file separate advisory votes on each tax revenue increase found in EHB 2163. The only thing limiting the Petition would be an equitable doctrines of repose, such as mootness, waiver, or laches.

The UDJA only requires that the Petitioner exhaust remedies or allege futility before bringing this action. He did so in a prompt (the same day) and timely (the same day) manner.

Laches and waiver are also inapplicable here, where Petitioner contacted the Attorney General on the same day in which the Attorney General made a determination that only one advisory vote on three tax revenue increases would be required in respect of EHB 2163, nor was Petitioner dilatory by filing his lawsuit one day after the Attorney General sent the Secretary of State the short description.

Mootness in only applicable when the court can no longer provide an effective remedy. *In re Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983). While the Attorney General speculates that a tax bill like EHB 2163 may never be passed again, such speculation is also inapplicable.

The issue is whether the Attorney General violated RCW 43.135.041(b). The Trial Court can so find. Such a finding would prevent the Attorney General from violating the statute again, if at any time before the statute is amended, revised, or reversed, such a bill containing more than one revenue increase is ever passed by the legislature again.

The issue is ripe for adjudication; the Court can find a remedy, and by doing so, breathe life back into a statute the Attorney General has otherwise vitiated.

Even if the Court were to consider the issue moot, the exception in *Sorenson v. Bellingham,* 80 Wn.2d 547, 558, 496 P.2d 512 (1972) still makes a decision here viable, because this is most certainly a matter involving a "continuing and substantial public interest." Mr. Eyman's desired remedy meets all of the *Sorenson* criteria: (1) the issue is of a public or private nature; (2) an authoritative determination is desirable to provide future guidance to public officers (particularly the Attorney General); and (3) the issue is likely to recur. *In re Cross, supra* at 377 (*citing Sorenson v. Bellingham,* at 558).

As a consequence, even if this issue were moot, this Court would still have jurisdiction to hear this matter. However, as the facts before the Court illustrate, the matter is not moot, and not subject to any other equitable doctrine of repose.

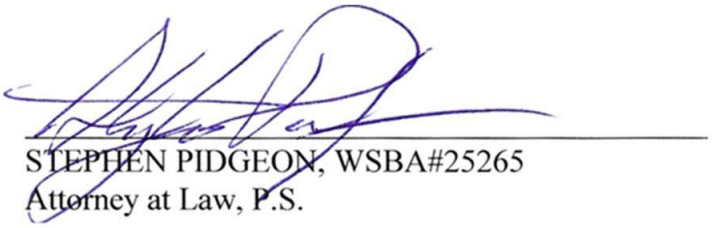
A "justiciable controversy" is before the Court; therefore the Court may reach the merits of a trial court's decision to deny declaratory judgment because there is relief for the court to resolve pursuant to chapter 7.24 RCW. *Walker v. Munro,* 124 Wash.2d 402, 411, 879 P.2d 920 (1994*); Fed. Way Sch. Dist. No. 210 v. State,* 167 Wash.2d 514, 529, 219 P.3d 941 (2009).

CONCLUSION

Mr. Eyman presents an actual, present and existing dispute. RCW 43.135.041 requires the Attorney General to provide the voting public with an advisory vote for each tax revenue increase enacted by the legislature. The language of the statute is unambiguous. The Court can determine whether the Attorney General has met the conditions of this statute or is acting in violation of this statute. Either the Attorney General was compliant with the statute or in violation thereof. The election did not cure the issue.

For these reasons, Petitioner again asks this Court to declare that RCW 43.135.041 required the attorney general to provide a separate advisory vote for each tax increase included in Engrossed House Bill 2163; and that RCW 43.135.041 defines the revenue increases described and enacted in Engrossed House Bill 2163 to be tax increases.

Respectfully submitted this 8th day of January 2018.



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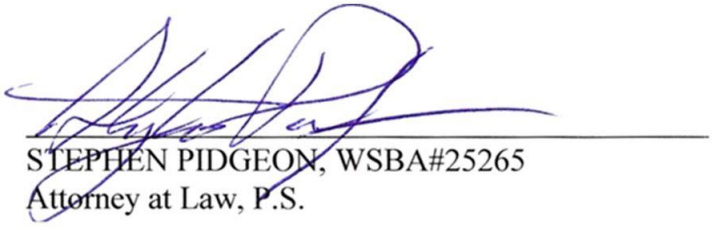
CERTIFICATE OF SERVICE

The undersigned now certifies that the foregoing was served upon the following by electronic service pursuant to a prior understanding,

Rebecca R. Glasgow, WSBA #32886
Callie A. Castillo, WSBA #38214
Deputies Solicitors General
1125 Washington Street SE PO Box 40100
Olympia, WA 98504-0100

this 8th day of January 2018.



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